BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAHEREH FOROUGHI	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 205,741
NURSES HOUSE CALL	)	& 208,027
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 10, 2006 Order Allowing Fees As Claimed entered by Administrative Law Judge Robert H. Foerschler. Claimant's attorney was awarded $2,972.68 in attorney fees and expenses incurred as a result of claimant's request for post-award medical treatment. The matter was placed on the Appeals Board's summary calendar and submitted for determination without oral argument.

ISSUES

Were the attorney fees and expenses ordered by the Administrative Law Judge (ALJ) reasonable with regard to claimant's request for post-award medical treatment? The parties acknowledge that of the expenses requested by claimant's attorney, $450 represented payment to Dr. Prostic, which the parties now acknowledge has been returned from Dr. Prostic to claimant's attorney and, therefore, is no longer at issue. The Board will, therefore, deduct $450 from the request for expenses, leaving $149.68 claimed as expenses for the services provided.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be modified to deduct $450 from the request for expenses submitted by claimant's attorney, but affirmed in all other regards.

Claimant originally suffered injury in this matter in July of 1995. Claimant had not worked for respondent for several years and had moved to California where she was working for a different employer. Claimant, however, had requested ongoing medical care as a result of difficulties which continued after her relocation. In May of 2005, claimant's attorney submitted to respondent a request for additional medical care. After that time, several additional requests for medical care were submitted, with claimant ultimately being referred to Dr. Bagheri in California for an examination on August 17, 2005.

The contacts between claimant's attorney and respondent's attorney in this matter are numerous. Telephone calls and letters regularly originated out of claimant's attorney's office to respondent, requesting medical treatment and later requesting copies of medical reports. These contacts, which appear to have occurred "fast and furious," were occasionally answered by respondent, although these responses were limited.

After the medical treatment was provided and the appropriate medical documentation transferred, claimant's attorney filed a Motion To Assess Attorney Fees with the Division of Workers Compensation on November 30, 2005. Attached to this Motion was an Affidavit from claimant's attorney dated November 21, 2005, with a printout of time and expenses incurred in obtaining this medical care also attached. Claimant's attorney provided an itemized statement, showing 30.5 hours of time incurred by both the attorney and his legal assistant, with the legal assistant billed at $30 per hour and the attorney requesting payment at $90 per hour. Total fees for both the attorney and the legal assistant were $2,373. Additionally, payment of expenses in the amount of $599.68 was requested, although $450 reimbursed from Dr. Prostic will be deducted from that amount pursuant to the agreement of the parties in their briefs, leaving $149.68 in expenses claimed.

The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits[1] and authorizes an award of attorney fees in connection with that request.[2] The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.[3] The general purpose of allowing attorney fees in these situations includes the policy reasons that (1) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and (2) statutes allowing

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[1] K.S.A. 2005 Supp. 44-510k(a).

[2] K.S.A. 2005 Supp. 44-510k(c) and K.S.A. 44-536(g).

[3] *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel.[4]

The Board acknowledges that the attorney work contemplated by the statute must be directed towards the securing of additional benefits for the claimant. Time billed for purely clerical or "ministerial services" would not be an appropriate billing, as it would be contrary to public policy to add the burden of attorney fees to a respondent who has complied with all the provisions of an award.[5]

It appears from this record that there was an ongoing dispute regarding claimant's entitlement to post-award medical care and which health care provider was to be responsible for providing those services. The Board acknowledges the time sheet for professional services, attached to claimant's attorney's November 21, 2005 Affidavit, has numerous entries which are somewhat questionable and, for the most part, unexplained. A multitude of entries indicate "review documents", with no additional explanation. Other entries include "review notes", "review file", "review notice", "review correspondence", "review letters", and "review bills", all with little or no additional explanation. However, claimant's attorney has filed an Affidavit with the attached time sheet, swearing to the legitimacy of the time and the accuracy of the billing statement. While respondent argues that the entries are inappropriate or perhaps the time is "padded," claimant's counsel was not questioned regarding and respondent offered no evidence to contradict the amount of time attached to the Affidavit or to verify or rebut whether the time was actually spent performing the listed tasks. The filing of the Affidavit, with the attached time sheet, created a prima facie case of legitimacy with regard to the services performed and the amounts of time spent. The ALJ noted it would have been contemplated the attorney would have had a better memory than the statement exhibits. However, the hourly charges are reasonable and the entries uncontradicted.

The Board finds the Affidavit and the billing summary to be proper and finds no reason in this record to question the amounts of time itemized.

Additionally, K.S.A. 2005 Supp. 44-510k(c) allows for the award of costs when post-award litigation occurs on a claimant's behalf. Costs, as described in that statute, are defined as including:

> . . . but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs. (Emphasis added.)

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[4] *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 199, 786 P.2d 618 (1990).

[5] *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

The Board has concluded that the language of K.S.A. 2005 Supp. 44-510k(c) indicates a list which is not all exclusive, but may also include items such as travel expense (including mileage), photocopying and telephone expenses, as appropriate "costs." The Board, therefore, affirms the award of attorney and legal assistant fees in the amount of $2,373, but modifies the Order of the ALJ by reducing the amount of costs and expenses by the amount of $450 to $149.68, for a total award of $2,522.68.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Allowing Fees As Claimed of Administrative Law Judge Robert H. Foerschler dated January 10, 2006, should be, and is hereby, modified to award fees and expenses in the amount of $2,522.68.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's opinion. K.S.A. 44-536(g) governs a request for post-award attorney fees. That statute provides a claimant's attorney is "entitled to reasonable attorney fees for such services" in connection with a post-award request. When, as here, the ultimate resolution generates no additional permanency but solely an order granting medical treatment, the ALJ is authorized to direct the fee to be paid by the employer.

It is well settled that the purpose of this statute is to discourage potential violators and encourage voluntary compliance with the statute(s) involved.[6] It is also designed to enable claimants to obtain competent counsel and is not intended to benefit the attorney.[7] The majority's opinion serves neither of these purposes.

Claimant's counsel seeks fees in connection with his assistance in obtaining post-award medical benefits commencing May 18, 2005.[8] Yet, his itemized bill reflects time in connection for this effort beginning May 4, 2005. Obviously, this entry alone raises some suspicion as to the accuracy of the time entries.

Counsel's bills then go on to list a number of entries where a legal assistant engages in a "review [of] documents". Of the 46 entries, 44 of them are stand-alone entries, in that they are not made in connection with the receipt of any particular document. Claimant's lawyer has many similar entries again without any recitation of what documents are being received. In addition, there are multiple entries indicating claimant's counsel would send demand letters to respondent, sometimes just days apart. If, as claimant contends, respondent was ignoring these demands, then a hearing should have been scheduled immediately. Instead, the tact taken in this case was to spend the next seven months "reviewing" documents and sending letters.

And of the letters claimant's counsel indicates he sent, there is not always a corresponding billing to substantiate the letter. For example, claimant's brief to the Board indicates that demands were made, in writing, on "August 26, August 31, September 6, September 9, September 14, September 16, September 20, September 21, and September 23".[9] Setting aside for the moment the unnecessary redundancy of nine demands for treatment over the course of a little more than four weeks, there is no time entry on August 26. The closest entry in time is two days earlier and it reflects a telephone conversation, not a letter.

According to claimant's counsel's brief and distilled to its essence, this matter was delayed due to the lack of response from respondent's counsel. One is left to wonder, in light of the billing records offered by claimant's counsel, if respondent's counsel was not responding to the *repeated* demands for treatment, why the case was not simply set for

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[6] *Id.*

[7] *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738, *rev. denied* 271 Kan. 1037 (2001).

[8] Claimant's Brief to the Board at 2 (filed Feb. 13, 2006), indicates that "[c]ounsel for Ms. Foroughi was contacted, by his client, by letter of May 18, 2005, inquiring about continuing medical treatment. At that time, she had been advised by the insurance adjuster that her treatment was no longer being approved or 'authorized.'"

[9] Claimant's Brief to the Board at 3 (filed Feb. 13, 2006).

a hearing, thereby avoiding any further investment of time. One must also wonder what documents were being reviewed if respondent was ignoring the repeated demands for treatment.

In sum, these Board Members find that the majority's opinion *unintentionally* rewards claimant's counsel for his inefficiency and unwillingness to press forward with his claim for post-award benefits. Although the statute contemplates an award for *reasonable* attorney fees, these Board Members find the time reflected in the billing records to be *unreasonable*.

Moreover, these Board Members believe there should be some proportionality to the benefit received. This is not to suggest that a dollar-for-dollar comparison be made between the fees requested and the value of the medical treatment. Rather, for a simple request for further evaluation and treatment, all that is normally required is a demand, possibly a follow up call or letter, and an exchange of records. And if that request is rebuffed, then a hearing should follow. Even at a higher rate than requested by claimant's counsel in this case, such would, again in most instances, be considered reasonable. However, these Board Members cannot condone the repeated unexplained entries over a seven-month period for a simple request for further medical treatment. There was no hearing held. There were no depositions taken or contemplated. K.S.A. 44-536(g) is not a mechanism to be used by lawyers to churn fees. For these reasons, we respectfully dissent from the majority's opinion and would remand this matter to the ALJ for a full hearing on the issue of the claimant's counsel's bills, the authenticity of each entry and its connection to the underlying issue of medical treatment.

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BOARD MEMBER

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BOARD MEMBER

c: Chris Miller, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director